BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDNA MAYLENE GARRISON	)	
Claimant	)	
	)	
VS.	)	
	)	
CALIBRATED FORMS COMPANY, INC.	)	
Respondent	)	Docket No. 1,011,403
	)	
AND	)	
	)	
NEW YORK UNDERWRITERS INS. CO. [1]	)	
LIBERTY MUTUAL INS. CO.	)	
Insurance Carriers	)	

ORDER

Claimant requests review of the September 1, 2004 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to prove "by a preponderance of the credible evidence that she had an injury arising out of and in the course of employment."[2] He also found that claimant's alleged aggravation of her ongoing and non-work related back complaints occurred during the period of time Liberty Mutual Insurance Company (Liberty Mutual) was on the risk.[3] Thus, although claimant was not awarded any benefits, Liberty Mutual was assessed the costs of the proceedings.

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[1] New York Underwriters Insurance Co., is a subsidiary of Hartford Accident & Indemnity, which was the insurance carrier listed on the ALJ's Preliminary Order.

[2] ALJ Order (Sept. 1, 2004) at 2.

[3] *Id.*

The claimant requests review of this decision alleging the ALJ exceeded "his jurisdiction in denying the [C]laimant medical treatment."[4] Claimant contends that when she returned to work on March 19, 2003 following back surgery for a pre-existing condition, she was not allowed to work four hour work days as recommended by her physician. Rather, respondent compelled her to work eight hour days and that, coupled with her captive position at a desk, aggravated her back complaints giving rise to a diagnosis of failed back syndrome.

Respondent and Liberty Mutual Insurance Company argue the ALJ's preliminary hearing Order should be affirmed as the evidence fails to establish that claimant sustained an accidental injury arising out of and in the course of her employment with respondent. Respondent and its carrier contend that claimant's present need for pain management is due to the failure of the fusion performed in November 2002. They maintain the failure of claimant's fusion bears no relationship to her work activities.

Respondent and its other carrier, New York Underwriters Insurance Company (New York), contend that claimant not only failed to satisfy her evidentiary burden to establish a compensable injury, but that the evidence clearly indicates that the alleged accident accrued after New York was responsible for the workers compensation coverage. New York's coverage ceased as of November 14, 2002, just before claimant's first back surgery. Claimant alleges an aggravation of her pre-existing back condition occurring from March 19, 2003 and up to her last date of work May 1, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ succinctly and completely set forth the facts surrounding the claimant's request for ongoing medical treatment in his September 1, 2004 Order. Accordingly, they will not be repeated herein except as needed to explain the Board's findings and conclusions.

Simply put, the claimant seeks pain management for her ongoing low back complaints. Claimant has a long history of suffering from non-work related low back complaints. Those complaints ultimately compelled her to undergo surgery in November 2002. She returned to work following her procedure, but attributes her present need for treatment to a six week period of work, commencing March 19, 2003 to May 1, 2003. Claimant maintains her physician, Dr. Frank J. Tomacek, recommended she return to work for a maximum of four hours per day and increasing those hours as tolerated. There is no

[4] Application for Review at 1.

dispute that respondent required claimant to return to work on a full-time basis, rather than just four hours per day. Claimant sought and received a release from her physician which allowed her to work the regular eight hour day.

Claimant's job as an order entry worker was sedentary and required her to write up individual work orders, input the information into the computer, print out the job order and attach it to the outside of a box. There was no repetitive bending involved and she was allowed to get up and down from her seat for breaks to go to the restroom, and after she completed each job.

When claimant returned to work for the six week period in 2003, she testified that the longer she was in her seat in a captive position, the worse her back pain became.[5] She further testified that she couldn't lay down as needed while working.[6] On May 1, 2003, claimant worked until approximately noon, and then left work due to the pain. She called her physician who took her off work for the next month. After some diagnostic tests and further evaluation, claimant underwent a second surgical procedure.

According to Dr. Tomacek, the treating physician, claimant returned to work too soon. Dr. Edward Prostic, a physician claimant consulted for a second opinion, indicated claimant's work constituted an aggravation of her injury. The ALJ considered both physicians' opinions and concluded that the record as a whole did not persuade him that claimant had an injury arising out of and in the course of employment.[7] He explained that:

> [t]he claimant had back problems long before her six weeks of work in 2003, and had undergone a fairly major surgical procedure that is not always successful. Her job duties were not very strenuous, and her doctor indicated at the time she returned to full time work that that was appropriate in her condition. The court is not persuaded that the claimant's failed back surgery and need for continuing treatment are due to her six week attempt to return to work post-surgery. The claimant has not proved by a preponderance of the credible evidence that she had an injury arising out of and in the course of employment.[8]

In order for a claimant to collect workers compensation benefits he or she must suffer an accidental injury arising out of and in the course employment. The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all

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[5] Claimant’s Depo. (May 4, 2004) at 59.

[6] *Id.* at 60.

[7] ALJ Order (Sept. 1, 2004) at 2.

[8] *Id.*

circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[9] An accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[10]

Here, the ALJ was not persuaded that claimant's six week period of working at a sedentary job aggravated her underlying back problems. Not only did he rely upon the lack of strenuous work duties and the absence of any indication that claimant's work activities altered her course of recovery, but also upon the fact that claimant was taking an arthritis medication following her surgery, which would delay bone healing following surgery.

The Board has considered the parties' arguments and finds that the ALJ's findings and conclusions should be affirmed. The Board remains unpersuaded that claimant sustained a compensable injury during her six week period of work in 2003. Accordingly, the ALJ's preliminary hearing Order is affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated September 2, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Heather Nye, Attorney for Respondent and New York Underwriters Ins. Co.
Michael D. Streit, Attorney for Respondent and Liberty Mutual Ins. Co.
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[10] *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976);.